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November 22, 1995

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

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NOV 27 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Dear Mr. Caton:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and ten copies of its Reply Comments in MM Docket No. 95-92.

If there are any questions in connection with the foregoing, please contact the undersigned.

Sincerely,

Sam Antar

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Before the
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates	)	MM Docket No. 95-92
	)	
47 C.F.R. §73.658(a), (b), (d), (e) and (g)	)	

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REPLY COMMENTS OF CAPITAL CITIES/ABC, INC.

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November 22, 1995

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Summary

None of the proponents of retaining the rules has presented evidence or arguments to show that the rules remain necessary to achieve the core purposes for which they were enacted 50 years ago -- to preserve affiliate autonomy to program in the public interest, and to remove entry barriers to new networks.

1. Affiliate Autonomy

The networks do not have market power over their affiliates. The comments by the Network Affiliated Stations Alliance ("NASA") do not demonstrate otherwise. Instead, relying on an analysis by National Economic Research Associates, Inc. ("NERA"), NASA asserts that because network affiliation is advantageous for a station, networks have so great a bargaining advantage as to require governmental intervention. But NERA's analysis fails to prove either its premise -- that networks have superior bargaining power even approaching market power -- or its asserted consequence -- that affiliates are foreclosed from presenting locally-oriented public interest programming.

a. The NASA/NERA Analysis

NERA examines three "direct" measures of the network/affiliate relationship -- clearances, compensation and relative profitability. In each case, NERA's conclusions about network bargaining power are not supported by the evidence it adduces. Countervailing evidence that NERA chooses to ignore proves that there has been a dramatic shift in bargaining power in favor of affiliates.

NERA concedes that its study showing an increase in network clearances from 1977 to 1994 is "statistically insignificant". In addition, NERA ignores evidence of the decline in clearances attributable to the cutback in the amount of daytime programs offered by the networks because of their inability to persuade affiliates to clear the programs.

NERA's compensation analysis, which purports to show a reduction (after adjustment for inflation) from 1980 to 1993 ignores the 200 million dollars in compensation increases since 1993. It also ignores the many other components of value that stations derive from affiliation, such as local commercial availabilities in network programming. Since 1990, on the ABC Television Network alone, the increase in affiliate commercial availabilities in prime time represents 60 million dollars a year in value transferred to affiliates.

NERA's comparison of affiliate and network profits is not a proper measure of relative bargaining power. Profits, at either the network level or station level, are a function of a host of factors that have nothing to do with the dynamic of the network/affiliate relationship.

b. The Right to Reject Rule

The Commission's proposal to clarify the right to reject rule to exclude financially motivated preemptions fully accommodates any residual concern about network bargaining power while curbing the potential for abuse that could destroy the economic base that makes networking possible. NASA's rejection of the proposal is an effort to overreach to achieve a commercial advantage for affiliates in their bargaining with networks. NASA's concern that the proposal would enmesh the Commission in an administrative quagmire is misplaced. Disputes over the right to reject would in all likelihood continue to be resolved the same way they are today -- through negotiations between the network and the affiliate, without resort to Commission processes.

NASA's reading of the Commission's "incentive compensation" policy is a distortion of relevant precedent. The Commission should take this opportunity to clearly state that incentive compensation plans that are consistent with an appropriately tailored right to reject rule are permissible.

2. Entry Barriers to New Networks

No proponent of retention of the rules has shown that networks have market power in any relevant market. In the absence of market power, there is no basis in either competition policy or diversity policy for the Commission to shield new networks from competition.

The argument that the time optioning and exclusive affiliation rules are necessary to preclude anticompetitive conduct by the existing networks to block the entry of new networks is entirely speculative and does not withstand analysis as a basis for retaining the rules. In fact, the only instance where the asserted competitive concerns could arise would be particular local markets where existing and potential local outlets are inadequate to serve as distributors for new networks. But those are precisely the markets in which local distributors are most powerful and in which it is highly unlikely that a network could exercise market power. The rule, in short, is overbroad and unnecessary as applied to most cases. Whatever competitive risks may remain are best left to the case-by-case application of the antitrust laws.

In arguing the case for retention of the rules, the United Paramount Network ("UPN") vastly overstates the undersupply of local broadcast outlets which are "qualified" to serve as UPN affiliates. Markets with six stations -- enough to support both the UPN and Warner Brothers networks -- represent 74% of national coverage.

3. The Dual Network Rule

Very few commenters propose retaining the dual network rule in its current form. NASA, in calling for eventual reform of the rule, acknowledges that marketplace changes have diminished the concern that dual networking could increase network bargaining power over affiliates. With respect to the transition to advanced television, NASA supports the position we articulated in our opening comments that networks be permitted to provide more than one network feed to affiliates. Viacom concedes that dual networking may foster efficiencies but argues that repeal of the rule could lead to the foreclosure of new networks. The risk of foreclosure is highly speculative, is, at most, market-specific and is accordingly best dealt with not by an overbroad rule but instead by relying upon antitrust law enforcement.

4. The Territorial Exclusivity Rule

The Commission should reject the proposal by Southern Broadcast Corporation of Sarasota ("SBC") that the territorial exclusivity rule be expanded and that the Commission adopt new enforcement procedures to implement the rule. SBC's proposal would impose new restrictions on multi-community negotiations which would be contrary to the public interest. It would substitute the Commission for the marketplace in determining when a network could terminate an affiliation. Multi-community negotiations can enhance network stability which has become increasingly important in light of the heightened competition among four and potentially more TV networks.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates 47 C.F.R. §73.658(a), (b), (d), (e) and (g)	)	MM Docket No. 95-92

To: The Commission

REPLY COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC") submits herewith its Reply Comments in the above-captioned proceeding. In analyzing the opening comments, we have focused on the principal purposes for which the network affiliation rules were enacted 50 years ago -- to preserve affiliate autonomy to program in the public interest, and to remove entry barriers to new networks.

As we will show below, none of the proponents of retaining the rules has presented evidence or arguments to show that the rules remain necessary to achieve these core purposes. In the first two sections of these reply comments, we deal with the questions of affiliate autonomy and entry barriers and comment primarily on the comments filed by the Network Affiliated Stations Alliance ("NASA") and the United Paramount Network ("UPN"). In the third section, we analyze the comments filed with respect to one of the rules at issue -- the dual network rule. In the final section, we comment on the proposal made by Southern Broadcast Corporation of Sarasota ("SBC") with respect to the territorial exclusivity rule.

I. Affiliate Autonomy

A. Networks Do Not Have Market Power Over Their Affiliates

The thrust of the NASA argument and the accompanying analysis by National Economic Research Associates, Inc. ("NERA") is that it is advantageous to a station to be affiliated with a network and that this gives a network leverage in bargaining with its affiliates. What NASA does not and cannot show is that this leverage, to the extent that it exists at all, constitutes network market power which would enable networks to interfere with affiliates' ability to fulfill their public interest obligations.

NASA and NERA argue that the networks have the upper hand in bargaining with the affiliates because network affiliates are more profitable then independent stations and stations thus have strong incentives to be affiliates. Indeed, NERA's Table 15 shows that affiliates profits have increased, and NERA concludes that "affiliation is as attractive an alternative to stations today as it was in 1980".[1] This argument itself proves that the networks do not have market power. If a network had market power, it would be able to extract virtually all of the value from the network/affiliate relationship without fear of losing the

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[1] National Economic Research Associates, Inc., Broadcast Television Networks and Affiliates: Economic Conditions and Relationship -- 1980 and Today (Oct. 27, 1995) ("NERA Study") at 8, submitted with Comments of Network Affiliated Stations Alliance (filed Oct. 30, 1995) ("NASA Comments").

affiliate. Networks are unable to appropriate that value because they face fierce competition from other networks and other program sources.

B. Absent Network Market Power, There Is No Reason For The Commission To Regulate The Bargaining Between Networks And Their Affiliates

Absent network market power, there is no reason to believe that a network could force clearances on its affiliates or that network/affiliate bargaining would result in foreclosing the ability of affiliates to present locally-oriented public interest programming. As we pointed out in our opening comments, a network and its affiliates are partners in an interdependent, symbiotic relationship the product of which is a program service which blends national and local programming. As is true of partnerships in many other contexts, the pursuit of unilateral advantage by either partner could jeopardize the objectives of the joint enterprise. Networks and affiliates could each argue that at the margin there is a temptation for the other to engage in such conduct. We would submit that when and if that occurs, the parties themselves are best equipped to resolve their differences through negotiation. There is no reason for the government to weigh in on the affiliate side; indeed, regulation may reduce the incentive of the affiliate partner to negotiate in good faith. When the Commission's Network Inquiry Special Staff ("NISS") closely examined the network/affiliate dynamic in 1980, it concluded that the rules at issue had at best little effect on affiliates' clearance patterns, because of "the failure of the Commission to recognize that a network and its affiliates have a joint incentive to maximize the profitability of network programs".[2] That observation remains as true today as it was then.

C. The NERA Analysis Does Not Prove That The Networks Have Superior Bargaining Power

Instead of arguing that the networks have market power, NERA argues that they have superior bargaining power -- a proposition that, even if true, would not justify maintaining the rules at issue. NERA's analysis, however, does not support even the limited proposition to which it is addressed. To the contrary, NERA relies on misleading comparisons, misinterprets the data it cites and ignores other facts that undermine its argument.

NERA's first error is to choose 1980 as a base year to track changes in relative bargaining power. The rules were predicated not on conditions in the television marketplace in 1980 but on conditions in radio in 1941. The rules were first applied to television in 1945 without modification or substantial comment.[3] NERA implies that 1980 is significant because the Commission made an affirmative finding in that year not to eliminate the rules. The Commission made no such finding. The real significance of 1980 is that it was in that year that NISS recommended that the rules be repealed because they "have largely failed to further the

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[2] Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report, October 1980 ("NISS Report") at IV-55.

[3] Notice, par. 2.

attainment of the Commission's goals of competition, diversity, and localism," and because they increase the costs of networking and might tend to bias new network programming away from broadcast outlets.[4] Since the marketplace facts on which NISS relied in 1980 continue to prevail, the NISS conclusions are still valid.

NERA examines a number of "external" or market factors that affect bargaining power -- one being the number of alternatives available to networks and affiliates -- as well as three "direct" measures of the network/affiliate relationship -- clearances, compensation and relative profitability. None of these factors supports the conclusion that networks have superior bargaining power in negotiating with their affiliates.

1. NERA's Analysis Of The Alternatives Available To Networks And To Affiliates

NERA's analysis of the number of alternative networks and affiliates does not support its conclusion that this factor has shifted bargaining power to the networks.

While NERA cites the increase in both the number of stations and networks,[5] it fails to acknowledge that such increases have added to the network competition for stations. One expects more competition when there are six networks bidding to affiliate with one of the six stations in a DMA than when there are only three networks bidding to affiliate with one of three stations in a DMA.

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[4] NISS Report at IV-55 - IV-56.

[5] NERA Study at 3.

NERA's analysis also ignores the "UHF handicap". While, as Fox has proven, UHF stations are a fully adequate base for building a network, the disparity between VHF and UHF outlets, to the extent that it remains, is a factor that increases the affiliates' bargaining leverage. Most network affiliates are VHF stations. NERA's Table 4 shows that 74% of the affiliates of ABC, CBS and NBC are VHF stations. While most Fox affiliates are UHF stations, when the affiliates of all four networks are grouped together, VHF stations account for 65% of the total.

2. NERA's Clearance Analysis

The NERA clearance analysis, which purports to show that the percentage of clearances of network programs on ABC, CBS and NBC affiliates increased from 1977 to 1994, does not support NERA's conclusion that the networks have increased their bargaining leverage.

NERA itself concedes that the clearance increases it found are statistically insignificant.[6] In spite of this fatal flaw in its analysis, NERA attempts to keep alive its case for increased network power by positing that clearances should have decreased during the period because of the decline in network viewing shares.[7] But NERA fails to mention that broadcasters as a group have lost audience to competing video outlets during the same period. Therefore, network programs, which are still the most

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[6] NERA Study at 11 n. 27.

[7] Id. at 11.

highly-rated, continue to be the most attractive programs relative to the competition. Moreover, NERA's analysis fails to take into account strong countervailing evidence that network leverage has declined. Between 1977 and 1994, the original networks were forced to cut their daytime programming back substantially because of their inability to persuade their affiliates to clear programs they had offered; in 1994, the original networks collectively programmed 25 fewer hours per week than they had in 1977.[8]

3. NERA's Affiliation Compensation Analysis

NERA's affiliate compensation analysis, which purports to show a reduction in compensation from 1980 to 1993 after adjustment for inflation, is distorted for a number of reasons.

First, it isolates compensation as if it were the only value that stations derive from affiliation. In fact, the value of affiliation has many components. In addition to compensation, it includes, among other things, the commercial availabilities the network allows stations to insert within network programming and the benefits of audience flow that high-rated network programs provide to the stations' local programs. Station profitability

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[8] Economists Incorporated, An Economic Analysis of the Prime Time Access Rule (March 17, 1995), submitted in MM Docket No. 94-123 ("PTAR Economic Analysis") at 23 and Appendix D. NASA cites an article describing CBS' 1993 efforts to obtain live clearances of the "Letterman" show as evidence of network power over affiliates. Yet, the thrust of the article is that CBS encountered stiff opposition from many affiliates and was obliged to make extraordinary efforts to achieve its objectives, including reliance on independent and Fox-affiliated stations. CBS' experience demonstrates that the networks do not have the power to force clearances and that they pay dearly for those clearances. Broadcasting & Cable, Aug. 16, 1993 at 17.

would be a more accurate measure of all these factors combined. Yet, NERA does not assert that affiliate profitability has declined. Instead, its Table 15 shows that station profits increased during this period.

Even if it were appropriate to analyze compensation as a separate factor, NERA's analysis is fundamentally flawed. First, it fails to take into account the compensation increases since 1993 which occurred as a direct result of the competition from Fox for affiliations. The resulting affiliation switches, which have affected some 90 stations in 43 markets, have increased the bargaining leverage not only of the stations that have switched but of all affiliates in these markets. Affiliates have used that leverage to negotiate substantial increases in compensation since 1993 reportedly on the order of $200 million.[9]

Second, NERA fails to control for a number of variables which could depress average compensation without necessarily reducing the compensation for any station or group of stations. Two of those variables are a) the number of new affiliates, mostly UHF stations in smaller markets with low levels of compensation, which would bring down the average and b) the amount of programming the networks offer. Since compensation is tied to programs

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[9] Variety, Sept. 4-10, 1995 at 25, 30; Broadcasting & Cable, Dec. 19, 1994 at 34. NERA seeks to pass off the massive increases in compensation since 1993 by arguing that it "would not put affiliates in a better position today after accounting for inflation." NERA Study at 10. According to NERA, total affiliate compensation in 1994 was $396 million. Id. at 10 n. 25. However, an increase of over 50% in affiliate compensation in one year, from about $400 million to about $600 million, obviously indicates a substantial improvement in the affiliates' position.

cleared, NERA's failure to account for the drop in the number of programs offered, which we discuss above, distorts the compensation comparison.

If one examines the number of affiliate commercial availabilities within network programs -- a key factor NERA ignores -- the inadequacy of NERA's compensation-only analysis becomes readily apparent. Since 1990, the number of commercial spots in network prime time programs that ABC has made available for sale by its affiliates has increased by approximately twelve 30-second spots per week.[10] Even using the conservative figure of $100,000 as the sales value of an average network prime-time spot, the twelve additional spots represent $60 million per year in value transferred to affiliates, dramatic proof of the shift of bargaining power in favor of affiliates.[11]

4. <u>NERA's Comparison Of Affiliate And Network Profits</u>

Comparing the profits of affiliates with those of networks is not a proper measure of relative bargaining power. Profits, at either the network level or the station level, are a function of a host of factors that have nothing to do with the dynamic of the network/affiliate relationship -- for example, the

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[10] While the absolute number of commercial spots in ABC prime time programming has also increased during this period, the affiliates have received a greater proportion of the newly created spots than they have historically received.

[11] Our tracking of local availabilities in CBS and NBC primetime programming suggests a similar increase in the number of spots made available for sale by those networks' affiliates.

quality of management or the success of stations in local news and other non-network time periods. NERA does not attempt to control for any of these factors.[12] In any event, NERA concedes that profits of the three networks increased only "slightly more" than those of the typical affiliate.[13] In addition, NERA's 1980 to 1993 comparison ignores the substantial increases in station compensation that have occurred since 1993 which have had the effect both of increasing affiliate profits and reducing network profits. The comparison would change radically in favor of affiliates if 1995 was used instead of 1993. The estimated 200 million dollars in increased yearly affiliate compensation paid by ABC, CBS and NBC since 1993 is more than 40% of the three-network profits shown for 1993. Finally, the NERA comparison between O&O profits and affiliate profits is not relevant to the network/ affiliate relationship. Even if such a comparison was relevant, NERA's analysis is invalid because it fails to account for the fact that the number of such O&O stations contributing to O&O profits increased from 14 stations in 1980 to 25 stations in 1993.[14]

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[12] In addition, the source upon which NERA relies for the networks' 1993 profits (NERA Study, Table 15) explains that as a result of accounting treatments, "a substantial portion" of the networks' 1993 profit figure "was illusory." Broadcasting & Cable, May 16, 1994 at 6 (noting that cost accounting methods added $243 million to CBS's 1993 profit figure).

[13] NERA Study at 11.

[14] Television Factbook, Stations 1980 at 583-b - 585-b; Television & Cable Factbook, Stations 1993 at A-1417, A-1432.

D. <u>The Commission's Proposal To Clarify The Right To Reject Rule Fully Accommodates Any Residual Concern About Network Bargaining Power</u>

Any residual concern about network bargaining power and the effect it could have on affiliate autonomy would be fully accommodated by a properly tailored right to reject rule. NASA's attack on the Commission's proposal to clarify the rule cannot be justified as necessary to preserve the ability of local stations to program in the public interest. We believe NASA's attack is an effort to overreach in order to obtain for affiliates a commercial advantage in their bargaining with networks. As we will show, it is also inconsistent with Commission precedent in interpreting the right to reject rule.

The Commission proposal is reasonable because it would confine the right to reject to the purposes for which the rule was originally designed. The original purpose of the rule was to prevent networks from forcing stations to broadcast programs they believe are not in the public interest. But the rule was never intended to create a device by which affiliates could preempt network programs merely to pursue individual economic gain at the expense of the network enterprise.

We characterize the NASA position as overreaching because a Commission rule requiring affiliates to reserve a right to reject or preempt network programs for purely financial reasons would make affiliation agreements entirely one-sided documents in which the network would grant each affiliate a right of "first call" on the network programs offered to them, but the affiliate would have no corresponding obligation to accept any such program. Such a rule could potentially destroy the network system. As we pointed out in our initial comments, affiliates can be subject to the temptation to take a "free ride" on the benefits of the network affiliation system by engaging in selective financially motivated preemptions because the station reaps all of the benefit from those preemptions.[15] From the station's point of view, in an individual case those benefits may outweigh the incremental weakening of the network system. However, if all affiliates behaved in the same way, the mass circulation base of the network and, thus, the underlying economic value of the network affiliation enterprise, would be destroyed.

Contrary to NASA's assertions,[16] the Commission has long recognized that the right to reject is not unlimited. It has expressly recognized that the reasons for rejection or preemption protected by the rule do not "purport to cover all situations in which an affiliate might wish to reject a network program in order to replace it with a program from another source."[17] Moreover, virtually from its inception until 1963, the right to reject was accompanied by Commission rules that permitted network options on

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[15] See Comments of Capital Cities/ABC, Inc. (filed October 30, 1995) at 16-17.

[16] According to NASA, the "Commission always has recognized that it cannot workably limit an affiliate's right to preempt its network to choices based solely on non-economic factors." NASA Comments at 17.

[17] Application of Section 3.658(a) and (e) of the Commission's Rules, 24 RR 513, 518-19 (1963).

station time. In 1963, when it banned time optioning, the Commission found that such options created an obligation to clear that was not swallowed up by the right to reject.[18] Indeed, time options would have been meaningless, if (as NASA suggests) the right to reject had been historically been interpreted as an unfettered right not tied to public interest programming.

NASA's concern that the proposed clarification would enmesh the Commission in an administrative quagmire is misplaced.[19] The Commission's proposal would not result in direct regulation of an affiliate's exercise of the right to reject. Instead, it would modify the existing limitation on the kinds of contract clearance commitments networks and their affiliates are permitted to negotiate. The result would be greater flexibility for both a network and its affiliates in negotiating these arrangements. There is no reason to believe that this would lead to any greater Commission involvement in the network affiliate bargaining process than now exists. The most likely scenario is that disputes over the right to reject would be resolved by the contracting parties, the network and the affiliate, in the same way they are resolved today, without resort to Commission processes.

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[18] Amendment of Section 3.658(d) and (e) of the Commission's Rules, 34 F.C.C. 1103, 1112 n.20, recon. denied, 45 F.C.C. 1062 (1963). It found also that option time agreements created a predisposition on the part of affiliates to clear network programs during the optioned hours, "which within the limits specified by our rules, they are obligated to do." 34 F.C.C. at 1113.

[19] See NASA Comments at 14-15.

E. The Commission Should Clarify Its "Incentive Compensation" Policy to Favor Such Methods Of Compensation Provided They Are Consistent With a Properly Tailored Right to Reject Rule

In arguing for retention of the right to reject rule in its present form, NASA also urges the Commission to "reaffirm" its policy on "incentive compensation" plans developed by the Commission in interpreting the right to reject.[20] For the reasons explained below, we disagree with NASA's analysis of the Commission's policy. Furthermore, we urge the Commission to clarify its policy to allow networks the flexibility to design efficiency-enhancing incentive compensation plans so long as such plans are consistent with a properly tailored right to reject rule.

NASA's specific proposal is that the Commission should "reaffirm" that which, according to NASA, the Commission held in the CBS compensation case from the early 1960's:[21]

> The Commission should reaffirm that compensation for program carriage (and, conversely, penalties for non-carriage) must be roughly proportional to the importance of the program in question to audience share or advertising revenues, and that the networks should not be permitted to manipulate compensation formulae to coerce carriage or impermissibly tie marginal programs to strong ones.[22]

NASA wildly distorts the holding of the CBS case. The Commission merely held that the CBS compensation scheme at issue -- which essentially paid affiliates 10% of their station rate for the

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[20] NASA Comments at 19.

[21] Columbia Broadcasting System, Inc., 22 RR 265 (1961); Application of Section 3.658(a) of the Commission's Rules, 23 RR 769 (1962) ("CBS").

[22] NASA Comments at 20.

first 60% of programs cleared, and 60% of the rate for clearances thereafter -- represented an "extreme sliding-scale formula which severely penalizes the affiliate which does not clear for the bulk of CBS programs."[23] The Commission announced no rule in the CBS case, as NASA now claims, that compensation for clearance of a program "must be roughly proportional to the importance of the program in question."[24] The Commission's decision is a much narrower one, directed only to extreme network compensation schemes that "require stations to take all or virtually all ... network programs offered."[25]

NASA has raised an issue that we believe the Commission should resolve not merely by rejecting NASA's suggestion, but by affirmatively clarifying its policy to encourage incentive compensation plans when they promote network stability and efficiency and are not inconsistent with a properly tailored right to reject rule.

When the Commission decided to eliminate time optioning in 1963, it recognized that there would be reason for serious concern

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[23] CBS, 23 RR 769, 771. See also 22 RR 265, 267 (clearances forced "by the economic pressure of an extreme sliding-scale formula for compensation").

[24] NASA Comments at 20. Indeed, under NASA's reading of the CBS case, most present network compensation schemes -- which generally pay a flat rate for programs cleared within each daypart regardless of the audience share or advertising revenue of the individual programs -- are illegal because they take no account of those factors.

[25] CBS, 23 RR 769, 775. Notably, the Commission added: "In reaching this conclusion, we wish to point out that at this time we do not regard all incentive plans as necessarily violating our rules, or as contrary to public policy." Id. at 780.

if network economics changed to the point that the appeal of networks to national advertisers was diminished.[26] In today's marketplace, where traditional network shares have been significantly eroded as the result of competition from new networks, syndication, cable and other media, the time is ripe for reconsidering decades-old restraints on network flexibility. Networks -- both new and old -- should be given the flexibility, if they so choose, to build incentives into their compensation plans to stabilize the circulation base on which they sell national advertising.

Networks should be permitted to encourage and reward affiliate clearance loyalty even to the point of paying bonuses for such loyalty so long as the affiliation contract makes it clear that affiliates cannot be penalized for exercising the right to reject under an appropriately tailored right to reject rule. In sum, the Commission should adopt the foregoing as the correct construction of the CBS case and reject the NASA approach.

II. Entry Barriers to New Networks

A. The Speculative Concern That Existing Networks Will Engage In Anti-Competitive Conduct To Block The Entry Of New Networks Does Not Justify Retaining The Rules

The fears expressed by UPN and by the Warner Bros. Television Network ("WB") that without the time optioning and exclusive affiliation rules the existing networks would engage in

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[26] Second Report and Order, Docket No. 12859, 12 RR 1651, par. 51 (1963).

anticompetitive conduct in order to block their entry can best be dealt with on a market-by-market, case-by-case basis through antitrust law enforcement. The rules at issue in this proceeding, which were designed to be prophylactic, are overbroad. They operate as unreasonable restraints on competition and should be eliminated.

There is no reason to believe that absent the rules the existing networks would necessarily succeed in negotiating for exclusivity or time optioning or that, if successful, such negotiations would lead to anticompetitive results. Repeal of the rules would only give them the opportunity to negotiate for such rights. In markets in which there are ample station and other outlets to serve as distributors for new networks, even if the existing networks were to succeed in negotiating such arrangements, there would nevertheless be no foreclosure effect. Even in markets in which there are fewer local outlets than viable networks and program suppliers, there is little reason for competitive concern. It is those same markets in which the local distributors are the most powerful and in which it is highly unlikely that a network could exercise market power.

Such risks of anticompetitive foreclosure as remain are best left to the case-by-case application of the antitrust laws, rather than a sweeping prophylactic rule. Indeed, UPN itself argues that the number of "potential qualified affiliates" available to it and WB in any market (and hence the potential foreclosure effect of exclusive affiliations or of option time) can only be determined